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PP v. SUBBARAU

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
B [CRIMINAL APPEAL NO: N-06B-55-09-2016]
1 AUGUST 2017

CRIMINAL LAW: *Official Secrets Act 1972 – Section 8(1)(c)(iii) – Possession of secret official documents – Leaking of secret official information to public –*
C *Communicating information or document via WhatsApp – Whether classified document includes information and material contained in initial, subsequent and final drafts – Whether contents official secret once document classified – Whether documents official secret*

D The respondent was charged with five counts under s. 8(1)(c)(iii) of the Official Secrets Act 1972 ('the OSA') with having possession in his handphone several Ujian Penilaian Sekolah Rendah ('UPSR') questions papers for the subjects of Bahasa Tamil Penulisan, Science, Mathematics and Bahasa Tamil Pemahaman ('2014 UPSR examination papers'). These images were shared *via* WhatsApp groups including communications from the
E respondent's telephone. Sometime in September 2014, the nation was jolted by the disclosure that examination papers for the UPSR had been leaked to members of the public. The Director of the Malaysian Examination Board ('PW12'), on being informed of the leakage, lodged a police report and several teachers, including the respondent, was thus arrested and his
F handphone seized. According to PW12, she had been appointed by the Minister of Education Malaysia to classify official documents, information and material as official secret and that the UPSR 2014 question papers had been classified as 'confidential'. The Sessions Court found that the prosecution had failed to establish a *prima facie* case in respect of all the
G charges against the respondent, and he was acquitted and discharged. The High Court Judge, in dismissing the prosecution's appeal, held that the prosecution had failed to prove that the documents specified in the charges were official secrets. Hence, this appeal. The issue that arose was whether the final 2014 UPSR examination papers pursuant to the five charges were
H official secrets.

Held (allowing appeal)
Per Vernon Ong Lam Kiat JCA (for the majority):

(1) A document which has been classified includes any information and material contained in an initial draft of the document, which contents
I are official secret once the document has been classified, and the official secret attaches to it any information and material of all subsequent drafts including the final version of the document. To hold otherwise would lead to absurdity as it would in effect require a certifying public officer

to classify each and every draft of a document including the final version of the document. It would lead to the further absurdity that if the subsequent drafts and final version are not classified individually, then the information and material in the subsequent and final drafts will not fall to be protected as official secret. It was thus clear that PW12 had intended to classify the UPSR examination papers and that the classification thereof included the information and material in the initial and subsequent drafts and final version of the UPSR examination papers. As such, the final UPSR examination papers in question were official secrets. The trial judge and the High Court Judge had misdirected themselves on the law and on facts. There was thus ample evidence to establish a *prima facie* case on all the five charges. (paras 24-26)

Per Harmindar Singh Dhaliwal JCA (dissenting):

(1) The phrase 'and any information and material relating thereto' in the definition of 'official secret' in s. 2 of the OSA must mean the information and material relating to the document sought to be the official secret. Herein, the official secret was the final approved version of the UPSR examination papers and information and material relating thereto would include the draft papers and not the other way around. It was also too much of a stretch to say that it was the 2014 UPSR examination paper that was classified and not the drafts as that was not borne out by the evidence and even in the discredited evidence of PW12. The only reasonable interpretation was that once the final 2014 UPSR examination paper was classified as official secret, then by the definition the initial and subsequent drafts would be deemed to be official secret. Any other interpretation would be a strained construction put on the words set out in the statute leading to confusion and injustice. The fear was that ordinary members of the public may be misled and then imprisoned through such a strained construction. (paras 51 & 52)

(2) The drafts will become official secrets once the final copy is classified as official secret. If the drafts are needed to be classified as official secret, then it becomes necessary to classify each and every draft as official secret. In any case, it could not be overemphasised that the law could not be concerned with the convenience or inconvenience of public officials tasked with carrying out their functions as set out in the law and especially in the case where the liberty of a subject was concerned. In the present case, an infringement of s. 8 of the OSA may result in imprisonment. (para 53)

***Bahasa Malaysia** Headnotes*

Responden dituduh dengan lima pertuduhan bawah s. 8(1)(c)(iii) Akta Rahsia Rasmi 1972 ('OSA') kerana mempunyai dalam milikannya beberapa kertas soalan Ujian Penilaian Sekolah Rendah ('UPSR') dalam telefon bimbitnya untuk subjek Bahasa Tamil Penulisan, Sains, Matematik dan Bahasa Tamil Pemahaman ('kertas soalan UPSR 2014'). Imej-imej ini dikongsi melalui

kumpulan-kumpulan WhatsApp termasuk komunikasi melalui telefon responden. Pada September 2014, satu negara digemparkan dengan pendedahan bahawa kertas soalan UPSR telah dibocorkan kepada awam. Pengarah Lembaga Peperiksaan Malaysia ('PW12'), setelah dimaklumkan berkenaan kebocoran ini, membuat laporan polis dan beberapa guru, termasuk responden, ditangkap dan telefon bimbitnya dirampas. Menurut PW12, beliau dilantik oleh Kementerian Pendidikan Malaysia untuk mengklasifikasikan dokumen, maklumat dan material rasmi sebagai rahsia rasmi dan bahawa kertas soalan UPSR 2014 itu telah diklasifikasikan sebagai 'sulit' olehnya. Mahkamah Sesyen mendapati bahawa pihak pendakwaan gagal membuktikan satu kes *prima facie* berkenaan semua pertuduhan-pertuduhan terhadap responden, dan responden dilepaskan dan dibebaskan. Mahkamah Tinggi, dalam menolak rayuan pihak pendakwaan, memutuskan pihak pendakwaan gagal membuktikan dokumen-dokumen dalam pertuduhan itu adalah rahsia rasmi. Oleh itu, rayuan ini. Isu yang timbul adalah sama ada kertas soalan UPSR 2014 muktamad selaras dengan kelima-lima pertuduhan adalah rahsia rasmi.

Diputuskan (membenarkan rayuan)
Oleh Vernon Ong Lam Kiat HMR (keputusan majoriti):

(1) Dokumen yang diklasifikasikan termasuk maklumat dan bahan yang terkandung dalam draf awal dokumen, di mana kandungannya adalah rahsia rasmi sebaik sahaja dokumen diklasifikasikan, dan rahsia rasmi yang berkait dengan apa-apa maklumat dan bahan semua draf seterusnya termasuk versi dokumen akhir. Untuk memutuskan sebaliknya akan membawa kepada kemustahilan kerana ini memerlukan pegawai awam yang disahkan untuk mengklasifikasikan setiap draf dokumen termasuk versi akhir dokumen. Ini akan membawa kepada kemustahilan selanjutnya jika draf seterusnya dan versi akhir tidak diklasifikasikan secara individu, maklumat dan bahan dalam draf seterusnya dan versi akhir tidak dilindungi sebagai rahsia rasmi. Jelas bahawa PW12 berniat untuk mengklasifikasikan kertas soalan UPSR dan klasifikasi itu termasuk maklumat dan bahan dalam draf awal dan seterusnya dan versi akhir kertas soalan UPSR. Oleh itu, kertas soalan UPSR versi akhir yang dipertikaikan adalah rahsia rasmi. Hakim bicara dan Hakim Mahkamah Tinggi telah tersalah arah atas fakta dan undang-undang. Terdapat keterangan memadai untuk membuktikan satu kes *prima facie* atas kelima-lima pertuduhan.

Oleh Harmindar Singh Dhaliwal HMR (menentang):

(1) Frasa 'and any information and material relating thereto' dalam definisi 'official secret' s. 2 OSA harus bermaksud maklumat dan bahan berhubungan dokumen yang dituntut sebagai rahsia rasmi. Di sini, rahsia rasmi adalah versi akhir kertas soalan UPSR yang diluluskan dan maklumat dan bahan berhubungannya akan termasuk kertas-kertas draf dan bukan sebaliknya. Terlalu jauh melangkau untuk menyatakan

bahawa adalah kertas soalan UPSR 2014 yang diklasifikasikan dan bukan draf-draf kerana itu tidak dibuktikan melalui keterangan dan juga dalam keterangan yang tidak boleh dipercayai oleh PW12. Hanya satu tafsiran munasabah iaitu bahawa sebaik sahaja kertas soalan UPSR 2014 diklasifikasikan sebagai rahsia rasmi, melalui definisi draf awal dan seterusnya adalah dianggap rahsia rasmi. Apa-apa tafsiran lain akan menjadi tafsiran tidak sesuai terhadap perkataan-perkataan yang ditetapkan dalam statut yang membawa kepada kekeliruan dan ketidakadilan. Amat membimbangkan jika pihak awam akan keliru dan kemudiannya ditangkap melalui ketegangan sebegitu.

(2) Draf-draf akan menjadi rahsia rasmi sebaik sahaja salinan akhir diklasifikasikan sebagai rahsia rasmi. Jika draf diperlukan untuk diklasifikasikan sebagai rahsia rasmi, akan menjadi satu keperluan untuk mengklasifikasikan setiap draf sebagai rahsia rasmi. Undang-undang tidak boleh terlibat dengan kemudahan atau kesusahan pegawai Kerajaan yang ditugaskan dengan menjalankan fungsi mereka seperti yang ditetapkan oleh undang-undang dan terutamanya dalam kes kebebasan subjek adalah diutamakan. Dalam kes ini, pelanggaran s. 8 OSA boleh mengakibatkan pemenjaraan.

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Barnard v. Gorman [1941] AC 374 ***(refd)***
Dzulkifli Abdul Hamid v. PP [1980] 1 LNS 91 FC ***(refd)***
Frederick Tan Im Kian v. PP [1986] 1 LNS 104 HC ***(refd)***
Khairuddin Hassan v. PP [2010] 7 CLJ 129 FC ***(refd)***
Lee Weng Fatt v. PP [2014] 1 LNS 1270 CA ***(refd)***
Liversidge v. Anderson [1942] AC 206 ***(refd)***
Mohammad Ezam Mohd Nor v. PP [2004] 2 CLJ 595 HC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Hoo Chee Keong [1997] 2 CLJ Supp 357 HC ***(refd)***
Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun [1980] 1 LNS 125 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 3, 8, 74, 78(1)(a)(ii), (iii), 114(g)
Interpretation Acts 1948 and 1967, s. 3
Official Secrets Act 1972, ss. 2, 2B, 8(1)(c)(iii), 16A
Penal Code, s. 29

For the appellant - Awang Armadajaya Awang Mahmud, Ahmad Terrirudin Mohd Salleh, Nadia Hanim Mohd Tajuddin, Norinna Bahadun & Muhammad Azmi Mashud; DPPs
For the respondent - M Kula Segaran; M/s Kula & Assocs

[Editor's note: Appeal from High Court, Negeri Sembilan; Criminal Appeals No: 42LB(A)-21 & 22-04-2015 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Vernon Ong Lam Kiat JCA (majority):

Introduction

[1] The prosecution's appeal relates to the decision of the High Court B dismissing the prosecution's appeal against the decision of the Sessions Court in acquitting and discharging the respondent at the close of the prosecution's case.

[2] After hearing of submission, we heard and allowed the appeal by a C majority decision, with my learned Justice Mohtarudin Baki and I being in the majority whilst our learned brother Justice Harmindar Singh Dhaliwal dissented. This then is our majority judgment.

[3] The respondent was charged with five counts under s. 8(1)(c)(iii) of the Official Secrets Act 1972 (OSA 1972) with having possession in his Samsung D Galaxy Note 2 smartphone between 9 September 2014 to 16 September 2014 the following documents, *to wit*:

(i) "Kertas soalan Bahasa Tamil-Penulisan 037 Ujian Penilaian Sekolah Rendah 2014";

(ii) "Kertas soalan Sains 018/1 Ujian Penilaian Sekolah Rendah 2014"; E

(iii) "kertas soalan Matematik 035/2 Ujian Penilaian Sekolah Rendah 2014";

(iv) "Kertas soalan Matematik 015/1 Ujian Penilaian Sekolah Rendah 2014"; and

F (v) "Kertas soalan Bahasa Tamil-Pemahaman Ujian Penilaian Sekolah Rendah 2014".

(hereinafter referred to collectively as "2014 UPSR examination papers")

The Salient Facts

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[4] The brief facts as found by the Sessions Court Judge is as follows:

(a) Upon being informed by PW11 and upon making comparisons PW12 made a police report on the leakage of the UPSR 2014 Science question paper on 10.9.2014 (Exhibit P32);

H (b) Investigations were conducted by PW15 and the accused was arrested by PW1 on 16.9.2014 at his house nombor No 591, Jalan Bukit Gelena 13, Taman Bukit Galena, Fasa 4, Negeri Sembilan. A 'Samsung Note 2' handphone (Exhibit P2) was seized from the accused. The arrest and seizure report is produced as Exhibit p1. PW9 confirmed that the telephone number 0102250064 is registered I under the accused name;

(c) One Prem Kumar a/l Padelrangam (Prem Kumar) was arrested by PW4 and a IPhone (Exhibit P8) was seized from him. PW8 confirmed that telephone number 0125794650 was registered under Prem Kumar's name;

(d) PW3 had examined the accused's handphone (P2) and found one image in P2. At the outset it must however be pointed out that this image is not the subject matter of any of the charges against the accused. PW3's report is marked as Exhibit P22;

(e) PW3 had also examined Prem Kumar's handphone (P8) and found that the images in P8 (offending images in P8) were substantially similar to the following actual UPSR question papers:

(i) Bahasa Tamil Penulisan O37 (Exhibit P19);

(ii) Science 018/1 (Exhibit P20);

(iii) Mathematics 035/2 (Exhibit P17);

(iv) Mathematics 015/1 (Exhibit P16); and

(v) Bahasa Tamil Pemahaman 036 (Exhibit P18);

(f) according to PW3 the images in P8 were shared by whatsapp groups and there were 3 whatsapp communications, including communications from the accused's telephone. PW3's report on P8 is marked as Exhibit P21. Prem Kumar, a vital prosecution's witness was not called to testify in this trial;

(g) according to PW12, she had been appointed by the Minister of Education Malaysia to classify official documents, information and material as official secret and that the UPSR 2014 question papers had been classified as 'confidential' (Sulit) by her and registered in the Buku Daftar Rahsia Rasmi (Exhibit P31). The certificate of appointment by the Minister was produced and after strong objections by the learned defence counsel was marked as ID29; and

(h) according to the UPSR Timetable (Exhibit P30):

(i) Bahasa Tamil penulisan 037 was scheduled on 10.9.2014 from 12.15 noon to 1.30 pm;

(ii) Science 018/1 was scheduled on 11.9.2014 from 8.15 am to 9.15 am;

(iii) Mathematics 035/2 was scheduled on 9.9.2014 from 12.20 noon to 1.00 pm;

(iv) Mathematics 015/1 was scheduled on 10.9.2014 from 8.15 am to 9.15 am; and

(v) Bahasa Tamil pemahaman 036 was scheduled on 10.9.2014 from 10.30 am to 11.20am.

A **Decision Of The Sessions Court Judge**

[5] The Sessions Court Judge (trial judge) found that the prosecution had failed to establish a *prima facie* case in respect of all the charges against the respondent. The following were *inter alia* the basis of the trial judge's findings:

B

(i) The prosecution failed to prove the documents specified in the charges (exhs. P16 - P20) are official secret;

(ii) The classification of the 2014 UPSR examination papers as official secret by PW12 is null and void and of no effect as PW12's
C appointment is not in accordance with s. 2B of the OSA 1972;

(iii) The appointment certificate of PW12 (ID29) by the Minister of Education is not authenticated and therefore inadmissible;

(iv) That PW12 was not a reliable and credible witness;

D

(v) That the non-calling of the Minister who issued ID29 is fatal to the prosecution's case and therefore adverse presumption under s. 114(g) of the Evidence Act 1950 is invoked;

(vi) That the prosecution failed to prove that the respondent had physical possession of exhs. P16 - P20 question papers;

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(vii) That the respondent did not have the prerequisite knowledge (*mens rea*) nor was he in a position to acquire any knowledge that the offending images in P8 were linked to the 2014 UPSR examination papers; and

(viii) That there is no evidence to show that the respondent had 'obtained'
F the exhs. P16 - P20 question papers as per the offending images in P8 and had 'retained' them in contravention of the OSA 1972.

[6] On appeal, the High Court concurred with the findings of the trial judge, hence the prosecution's appeal to this court.

G **Submission Of Counsel**

[7] Learned DPP submitted on two main issues. The first related to the question of whether PW12 is a person who is empowered to classify documents as official secret. The second issue relates to the elements of the offence under s. 8(1) of the OSA 1972.

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[8] On the first issue, learned DPP argued that PW12 is a public officer designated as the Director of the Malaysian Examination Board (MEB). As such, PW12 is a person charged with the responsibility of examinations in Malaysia within the meaning of s. 16A of the OSA 1972. PW12 is directly empowered to regularise all affairs pertaining to examination and
I examination papers nationwide. Therefore, as mandated by s. 16A, even without appointment as a 'classifying officer', PW12 can in her very capacity as the Director of the MEB certify documents as official secret.

[9] Insofar as the certificate of appointment (exh. ID29) appointing PW12 by the then Education Minister is concerned, learned DPP argued that ID29 is a public document by virtue of s. 74 read together with s. 78(1)(a)(ii) and (iii) of the Evidence Act 1950 renders ID29 a public document whereby the need to call the maker is dispensed with (*PP v. Hoo Chee Keong* [1997] 2 CLJ Supp 357; [1997] 4 MLJ 451; *Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun* [1980] 1 LNS 125; [1981] 1 MLJ 201 (FC)).

[10] On the second issue, learned DPP argued that there are four elements of the offence under s. 8(1) of the OSA 1972. First, that the documents specified in the charges are official secret. Second, the respondent has in his possession the offending documents. Third, the offending documents were obtained by the respondent in contravention of the OSA 1972. And, fourth the respondent retained the offending documents when he had no right to retain them.

[11] The documents forming the subject matter of the charges are in the form of WhatsApp images in Prem Kumar's handphone P8. The evidence of SP3 and SP4 together with the data analysis (exh. P21) made by SKMM confirm that the offending images found in P8 were sent to 'MHS Ipoh WhatsApp group' from the respondent's handphone P2. SP3 who conducted an analysis found that the WhatsApp conversations contained 67 images comprising of pages of the documents particularised in the five charges. The images were identified and marked as the following exhibits:

P16 - 15 images of Kertas Matematik 015/1

P17 - 10 images of Kertas Matematik 035/2

P18 - 22 images of Kertas Bahasa Tamil Pemahaman 036

P19 - 4 images of Kertas Bahasa Tamil Penulisan 037

P20 - 16 images of Kertas Sains 018

[12] Learned DPP argued that even though none of the offending images was found in the handphone of the respondent, the evidence clearly shows that all 67 images came from one source ie, the respondent's handphone. The evidence of SP9 further confirmed that handphone nos. 010-2250064 and 012-5794650 were registered under the respondent's and Prem Kumar's names respectively. As such, it was argued that there is a strong nexus implicating the respondent (*Lee Weng Fatt v. PP* [2014] 1 LNS 1270).

[13] Learned DPP also argued that it can be inferred that the respondent had prerequisite knowledge and thus *mens rea* possession of the offending images before sending it to Prem Kumar because (i) the images were obtained and retained by the respondent and are identical to the actual UPSR 2014 examination papers, (ii) the images were sent over a period of two days, (iii) the images were sent on 9 September 2014 and 10 September 2014 which was just prior to the UPSR examination dates, and (iv) the conduct of the respondent deleting the images in his handphone. As such, the respondent has the duty to explain his conduct (s. 8 of the Evidence Act 1950; *Parlan*

A *Dadeh v. PP* [2009] 1 CLJ 717; *Khairuddin Hassan v. PP* [2010] 7 CLJ 129). Further, the respondent cannot avail himself as an innocent recipient (*Dzulkifli Abdul Hamid v. PP* [1980] 1 LNS 91; *Frederick Tan Im Kian v. PP* [1986] 1 LNS 104). Accordingly, it was argued that the element of 'obtaining' and retaining are closely linked to the fact that the respondent has
B had possession of the images of the examination papers. As such, the trial judge erred in holding that the prosecution has failed to prove that the respondent had knowledge of the existence of the images or had possession of the same. The offence was committed by the respondent at the material time when he had in his possession the images he had obtained in
C contravention of the OSA 1972 and retained it in his handphone and subsequently sending the images *via* WhatsApp group knowingly that it was the UPSR examination papers. SP3 the forensic analyst from SKMM explained that the fact that none of the images was found in the respondent's handphone could be due to the images being deleted and thereafter overridden so that there is nothing left to extract in the handphone. As such,
D the fact that nothing was found in the respondent's handphone does not negate the fact that the single source of the images came from the respondent's handphone.

[14] The main points taken by learned counsel for the respondent are as
E follows. First, the certificate of appointment ID29 is inadmissible because it was not signed by the Minister. As such, the adverse inference under s. 114(g) should be invoked for the failure to call the Minister or the special officer of the Minister. Further, as ID29 was not gazetted, the court cannot take judicial notice of ID29.

F **[15]** Second, the documents classified by PW12 as official secret according to the register of official secret (exh. P31) were only drafts of the UPSR examination papers and not the final UPSR examination papers. PW12 did not give any explanation as to why there were additional signatures affixed on the register.

G **[16]** Third, there is a gap in the prosecution's case because Prem Kumar was an important witness and he was not called to testify (*Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16 (SC)). Further, there is no evidence to show that the respondent had possession of the images.

H **[17]** Lastly, learned counsel argued that s. 16A is inconsistent with the interpretation of official secret in s. 2 of the OSA 1972 and that as such s. 16A is obnoxious, draconian and oppressive. Therefore, he argued s. 16A, is void to the extent of the inconsistency (*Mohammad Ezam Mohd Nor v. PP* [2004] 2 CLJ 595).

I **Decision**

[18] Upon a perusal of the appeal record and after hearing of submission of counsel, we are in agreement with the submission of learned DPP. We are of the considered view that the only real issue before the court relates to the

question of whether the final 2014 UPSR examination papers pursuant to the five charges are official secret. The point taken by counsel is that only the drafts of the UPSR examination papers were classified by PW12. In fact, this point was taken by the trial judge in the following words at para. 43 of the trial judge's written judgment which is as follows:

> 43. It is needless to say that the date when Exhibits P16 to 20 were classified is very pertinent to the charge. **Exhibits P16 to 20 are certainly not the first version** (sic) that were sent to the printers for printing as admitted by PW12. Each amended copy would necessarily give birth to a fresh document and would require a fresh classification under the OSA in order to be protected as official secret. *In this case the prosecution has failed to establish on a prima facie evidence that the final amended question papers in the form of Exhibits P16 to 20 were classified as official secret before the dates specified in the charge against the accused*. (emphasis added)

[19] The words 'official secret' and 'document' are defined under s. 2 of the OSA 1972 as follows:

> 'official secret' means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret'. 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under s. 2B;
>
> 'document' includes, in addition to a document in writing and part of a document:
>
> (a) any map, plan, model, graph or drawing;
> (b) any photograph;
> (c) any disc, tape, sound track or other device in which sound or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other component) of being reproduced therefrom; and
> (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

[20] The word 'document' is also defined to denote any matter expressed or described upon any substance by means of letters, figures of marks, or by more than one of those means, intended to be used, or which may be used, as evidence for that matter (s. 29 of the Penal Code; s. 3 of the Evidence Act 1950; s. 3 of the Interpretation Acts 1948 and 1967).

[21] According to the 'Daftar Suratan Rahsia Rasmi Di Luar Jadual Akta Rahsia Rasmi 1972 Dan Berhubungan Dengannya Yang Dikelaskan' (exh. P31) the documents in question were classified by PW12 in the following format:

Bil.	Tarikh Surat	Rujukan Surat	Perkara	Pengelasan	Dikelaskan Oleh	Tandatangan	Catatan
…	…	… UPSR 2014	…	…	…	…	…
…	…	…	…	…	…	…	…
…	…	…	…	…	…	…	…
543	1.7.2014	015/1	Mathematics 2 SK (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	…
…	…	…	…	…	…	…	…
…	…	…	…	…	…	…	…
545	8.7.2014	018	Science SK (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	…
…	…	…	…	…	…	…	…
…	…	…	…	…	…	…	…
548	8.7.2014	035/2 (P.P.)	P.P Mathematics 2 SJKT	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	…
…	…	…	…	…	…	…	…
568	22.7.2014	036	Bahasa Tamil Pemahaman SJKT (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	…

569	22.7.2014	037	Bahasa Tamil Penulisan SJKT (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	…
…	…	…	…	…	…	…	…
574	22.7.2014	037 (P/P)	P.I. Bahasa Tamil Penulisan SJKT	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	…
…	…	…	…	…	…	…	…

[22] In our view, as the documents in question is the 2014 UPSR examination paper, it is the 2014 UPSR examination paper that were classified and not the draft or the paper on which it is created. For instance, when PW12 classified the document described as Mathematics 035/2 examination paper on 1 July 2014, it was the Mathematics 035/2 examination paper which was classified. We say this in the light of the meaning ascribed to the words 'official secret' includes 'any information and material relating thereto'. Any information and material relating to the said Mathematics 035/2 examination paper would include the information and material contained in all initial and subsequent drafts of the said examination paper and the final version of the examination paper.

[23] In the ordinary course of work, the making of a document begins with the creation of an initial draft containing such information and material relating to the document in question. In the case of the initial draft for the Mathematics examination paper for instance, the initial draft would contain instructions, mathematics questions graphs, drawings and other material. Any revisions or amendments to the instructions, questions and materials in the initial draft and subsequent drafts would relate to the Mathematics examination paper - ie, such information and material relating thereto.

[24] Accordingly, we hold that a document which has been classified includes any information and material contained in an initial draft of the document, which contents are official secret once the document has been classified, and the official secret attaches to it any information and material of all subsequent drafts including the final version of the document.

[25] To hold otherwise would lead to absurdity as it would in effect require a certifying public officer to classify each and every draft of a document including the final version of the document. It would lead to the further

absurdity that if the subsequent drafts and final version are not classified individually, then the information and material in the subsequent and final drafts will not fall to be protected as official secret. Therefore, we do not think that it is necessary for PW12 to classify each and every draft and the final version of the UPSR examination paper. On the established facts, it is clear that PW12 intended to classify the UPSR examination papers and that the classification thereof includes the information and material in the initial and subsequent drafts and final version of the UPSR examination papers. As such, we hold that the final UPSR examination papers in question are official secret.

[26] We are therefore constrained to hold that the trial judge and High Court Judge misdirected themselves on the law and on the facts. On the totality of the evidence, we agree with submission of learned DPP that there is ample evidence to establish a *prima facie* case on all the five charges.

[27] For the foregoing reasons, we set aside the orders of the High Court and the Sessions Court and ordered the respondent to enter on his defence on the five charges.

Harmindar Singh Dhaliwal JCA (dissenting):

[28] The respondent faced five charges in the Sessions Court at Seremban for offences under s. 8(1)(c)(iii) of the Official Secrets Act 1972 ("OSA 1972"). The charges related to possession in his Samsung Galaxy Note 2 smartphone of the following (referred to collectively as "2014 UPSR examination papers"):

(i) "Kertas soalan Bahasa Tamil – Penulisan 037 Ujian Penilaian Sekolah Rendah 2014";

(ii) "Kertas soalan Sains 018/1 Penulisan 037 Ujian Penilaian Sekolah Rendah 2014";

(iii) "Kertas soalan Matematik 035/2 Ujian Penilaian Sekolah Rendah 2014";

(iv) "Kertas soalan Matematik 015/1 Ujian Penilaian Sekolah Rendah 2014"; and

(v) "Kertas soalan Bahasa Tamil - Pemahaman Ujian Penilaian Sekolah Rendah 2014"

[29] After a trial, and at the end of the prosecution's case, the respondent was acquitted and discharged on all the five charges by the Sessions Court on 16 April 2015. The prosecution then appealed to the Seremban High Court. On 5 September 2016, the High Court dismissed the appeal and affirmed the decision of the Sessions Court.

[30] Being dissatisfied, the Public Prosecutor filed an appeal against that decision to this court. The appeal was heard on 12 April 2017 and adjourned for decision. On 25 May 2017, the appeal was allowed by a majority

decision. Although I was in agreement with my learned brothers on all the issues raised, I had, with respect, serious reservations on the question of whether the documents forming the subject matter of the charge had been properly classified as official secrets. I am therefore compelled to provide reasons for my dissenting view which now follow.

The Relevant Facts

[31] The factual matrix of the case falls within a narrow compass. Sometime in September 2014, the nation was jolted by the disclosure that examination papers for the Ujian Pencapaian Sekolah Rendah ("UPSR") had been leaked to members of the public. There was much further outcry when the pupils involved, namely year six pupils throughout the country, had to resit the five leaked papers.

[32] Swift investigations by the police resulted in the arrest of several teachers. One of the teachers was the respondent. PW12, the Director of the Malaysian Examination Board, on being informed of the leakage, made a police report on the leakage of the UPSR 2014 Science question paper on 10 September 2014. Investigations were conducted by PW15, a police officer, and the respondent was arrested by PW1, a police officer, on 16 September 2014 at his house No. 591, Jalan Bukit Gelena 13, Taman Bukit Galena, Fasa 4, Negeri Sembilan. A Samsung Note 2 handphone (exh. P2) was seized from the respondent. It was confirmed that the telephone number 0102250064 was registered under the respondent's name.

[33] Subsequently, one Prem Kumar a/l Padelrangam ("Prem Kumar") was arrested by PW4, a police officer, and an I-Phone handphone (exh. P8) was seized from him. It was confirmed that telephone number 0125794650 was registered under Prem Kumar's name. It also transpired that PW3, a forensic analyst, had examined the respondent's handphone (exh. P2) and found one image in the said phone. This image, however, was not the subject matter of any of the charges against the respondent.

[34] PW3 had also examined Prem Kumar's handphone (exh. P8) and found that the images in P8 were substantially similar to the following actual UPSR question papers:

(i) Bahasa Tamil Penulisan 037 (exh. P19);

(ii) Science 018/1 (exh. P20);

(iii) Mathematics O35/2 (exh. P17);

(iv) Mathematics 015/1 (exh. P16); and

(v) Bahasa Tamil Pemahaman 036 (exh. P18).

[35] According to PW3, the offending images in P8 were shared by WhatsApp groups and there were three WhatsApp communications, including communications from the respondent's hand phone. PW3 had prepared a report marked as exh. P21.

[36] According to PW12, she had been appointed by the Minister of Education Malaysia to classify official documents, information and material as official secret and that the UPSR 2014 question papers had been classified as 'confidential' (sulit) by her and registered in the Buku Daftar Rahsia Rasmi (exh. P31). The certificate of appointment by the Minister was produced and, after strong objections by the learned defence counsel, was marked as ID29.

[37] According to the UPSR timetable (exh. P30), the Bahasa Tamil Penulisan 037 examination was scheduled on 10 September 2014 from 12.15 noon to 1.30pm; the Science 018/1 examination was scheduled on 11 September 2014 from 8.15am to 9.15am; the Mathematics 035/2 examination was scheduled on 9 September from 12.20 noon to 1pm; the Mathematics 015/1 examination was scheduled on 10 September 2015 from 8.15am to 9.15am; and the Bahasa Tamil Pemahaman 036 examination was scheduled on 10 September 2014 from 10.30am to 11.20am.

Findings By The Trial Court

[38] At the end of the prosecution's case, the learned trial judge acquitted the respondent. The learned trial judge found that the prosecution had failed to prove a *prima facie* case against the respondent on all the charges. The basis of the trial judge's findings have been summarised by my learned brother Justice Vernon Ong in the majority judgment and no useful purpose would be served to reproduce the same. Suffice it to say, that among the reasons given, and which will form the basis of this judgment, it was held that the prosecution had failed to prove that the documents specified in the charges are official secrets.

The Instant Appeal

[39] Before us, the learned DPP for the appellant submitted at length to persuade the court that the trial court had fallen into error when acquitting the respondent without his defence being called. It was further submitted that the High Court sitting on appeal was also wrong in affirming that decision.

[40] I should state at the outset that I have no quarrel with the decision by the majority with respect to all the issues raised except for one. As I had mentioned earlier, the issue with which I had to respectfully part company with my learned brother judges is whether the final 2014 UPSR examination papers which formed the subject matter of the charge were official secrets.

[41] In this respect, it was the finding of the learned Sessions Judge that only the draft of the UPSR papers were classified by PW12 and not the finalised papers. The learned judge duly noted the process adopted in preparing the final papers at para. 42 of the judgment as follows:

> 42. After making amendments, modifications and change it is then sent back to the printers. This process can be repeated over several times until the final draft is approved and sent for printing. PW12 cannot now explain how many times this process took for P16 to 20. PW12 also cannot recall

the date of final approval of the said paper. She is unable to confirm when the final approval of Exhibits P16 to 20 were classified as official secret. Nonetheless, she pointed out her second signatures in Exhibit P31 is to signify that the examination papers were amended. PW12 however cannot remember when she signed it as her signatures were undated. It was not surprising therefore for the learned defence counsel to challenge the date of the second signature signifying the actual date Exhibits P16 to 20 were classified as official secret. Learned defence counsel even suggested that PW12 only placed her second signature after the leakage of the examination *fiasco* was exposed and when it was found that the final amended approved examination papers were not properly classified before the 2014 UPSR examination. PW12 denied. Coincidentally, PW12's second signature is found only on the leaked examination papers giving rise to reasonable doubts and suspicions as to whether P16 to 20 were in fact actually classified before the 2014 UPSR examination. She did not appear confident. I did not find her truthful on this issue. In any event no copies of the first draft or subsequent amended drafts that were classified as official secret by PW12 were produced by PW12 to prove the date of birth of Exhibits P16 to 20.

[42] Having made this finding, the learned judge then went on to make the following conclusion in the next paragraph of the judgment:

43. It is needless to say that the date when Exhibits P16 to 20 were classified is very pertinent to the charge. Exhibits P16 to 20 are certainly not the first version that were sent to the printers for printing as admitted by PW12. Each amended copy would necessarily give birth to a fresh document and would require a fresh classification under the OSA in order to be protected as official secret. In this case the prosecution has failed to establish on a *prima facie* evidence that the final amended question papers in the form of Exhibits P16 to 20 were classified as official secret before the dates specified in the charge against the accused.

[43] In this respect, the High Court accepted these findings when it was held at para. 35 of the judgment:

[35] Mahkamah ini telah meneliti Alasan Penghakiman Hakim Mahkamah Sesyen yang bijaksana dan mendapati bahawa Hakim Mahkamah Sesyen telah meneliti keterangan secara keseluruhan dan menganalisa setiap isu di hadapannya dengan secara mendalam berdasarkan prinsip undang-undang yang mana mahkamah ini dapati tidak ada sebab untuk menganggu dapatan tersebut dan mahkamah ini tidak perlu campur tangan kerana mahkamah ini bersetuju dengan dapatan oleh Hakim Mahkamah Sesyen yang bijaksana.

[44] Coming back to the charges faced by the respondent, it was common ground that the prosecution had to prove the following for an offence under s. 8(1) of the OSA 1972:

(a) The documents specified in the charges namely the 2014 UPSR examination papers ('the offending documents') are official secrets;

(b) The respondent had in his possession the said offending documents;

(c) The said offending documents were obtained by the respondent in contravention of OSA; and

(d) The respondent had retained the said offending documents when he had no right to retain them.

[45] As the issue here is with respect to whether the documents specified in the charges were official secrets, the starting point in this connection must be the definition of "official secret" in s. 2 of the OSA 1972 where it is stated: "official secret" means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as "top secret", "secret", "confidential" or "restricted", as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under s. 2B.

[46] Now, in the instant case, it cannot be argued otherwise that the final version of the examination papers were not classified as official secret although each one of the draft papers was so classified. It is of course curious in the least as to why so much effort went into classifying the draft copies but not the all-important final copy. It was in evidence that the final copy may be different from the earlier draft copies as several amendments were made to the drafts as conceded by PW12. The irresistible inference is that this non-classification was an oversight by PW12.

[47] In fact, the evidence of PW12 in this context was considered by the trial judge as unreliable and the learned judge went so far as to find that PW12 was "untruthful on this issue". Hence the learned judge took the view that each amended copy ought to be classified as official secret and since no evidence was adduced to show that the final copy was so classified, the prosecution has failed to establish a *prima facie* case.

[48] The prosecution, in this appeal, is, however, relying on the definition of "official secret' as set out earlier to assert that the final copy of the examination papers was information and material relating to the draft copies which were classified. This submission has found favour with the majority here in that their view is that there was no need for PW12 to classify each and every draft and the final UPSR examination papers as the classification thereof included the information and material in the initial and subsequent drafts and final version of the UPSR examination papers.

[49] With respect, it is trite law that a penal provision which carries grave consequences in the event of its transgression, must be construed strictly. The duty of the courts is plain. We must not give the statutory provision a wider meaning merely because a narrower construction would be inconvenient to the prosecution or the State (see *Barnard v. Gorman* [1941] AC 378; *Liversidge v. Anderson* [1942] AC 206).

[50] The leading local authority for this proposition is the Federal Court decision in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 where the salutary observations of Chong Siew Fai CJ (Sabah & Sarawak), in how a penal statute ought to be construed, are most instructive (at p. 189):

> In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss. (d) and (da) of s. 37 of the Act, being penal provisions, must be strictly construed, and must not be extended beyond their clear meaning. *Liew Sai Wah v. PP* [1968] 2 MLJ 1 PC; *PP v. Leong Kuai Hong* [1981] 1 MLJ 246 FC. See also *Stenhenson v. Higginson* [1851] 3 HL Cas 638 where Lord Truro observed: (p. 686)
>
> > … but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense, must plainly appear.
>
> And in *R v. Cuthbertson* [1980] 2 All ER 401 HL where a forfeiture provision in the Misuse of Drugs Act 1971 (English) was called for construction, Lord Diplock observed: (p. 404)
>
> > The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear.
>
> The wordings of sub-ss. (d) and (da) of s. 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two sub-sections must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, and they are not clear, and if one interpretation is more favourable to the accused than the other, the court will adopt the one more favourable to the accused.

[51] Reverting to the instant appeal, the phrase "and any information and material relating thereto" in the definition of "official secret" in s. 2 of the OSA 1972 must mean, in my view, the information and material relating to the document sought to be the official secret. In the present case, the official secret is the final approved version of the UPSR examination papers and information and material relating thereto would include the draft papers and not the other way around as suggested in the majority judgment. It would also be too much of a stretch to say that it was the 2014 UPSR examination paper that was classified and not the drafts as that is not borne out by the evidence and even in the discredited evidence of PW12.

[52] The only reasonable interpretation is that once the final 2014 UPSR examination paper is classified as official secret, then by the definition the initial and subsequent drafts will be deemed to be official secret. Any other interpretation would be a strained construction put on the words set out in the statute leading to confusion and injustice. The fear is that ordinary members of the public may be misled and then imprisoned through such a strained construction.

[53] With respect, the assertion that this interpretation would lead to absurdity as the certifying public officer would have to classify each and every draft is untenable. As mentioned earlier, the drafts will become official secrets once the final copy is classified as official secret. If the drafts are needed to be classified as official secret, then it becomes necessary to classify each and every draft as official secret. In any case, it cannot be overemphasised that the law cannot be concerned with the convenience or inconvenience of public officials tasked with carrying out their functions as set out in the law and especially in the case where the liberty of a subject is concerned. In the present case, an infringement of s. 8 of the OSA 1972 may result in imprisonment. Inconvenience did not appear to be an issue for PW12 as she was all along able to classify the drafts. It turned out that she probably overlooked classifying the final approved document.

Conclusion

[54] In the circumstances, and for the reasons mentioned, I found no reason to disagree with the decision of the courts below. The appeal is, accordingly, dismissed.